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No. 85-659

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

ALWIN E. HOPFMANN,
Petitioner

v.

UNITED STATES FEDERAL ELECTION COMMISSION, EDWARD M. KENNEDY and THE COMMITTEE TO RE-ELECT SENATOR KENNEDY,
Respondents,

PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Reply Brief of Petitioner

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PETITIONER'S REPLY BRIEF

ARGUMENTS IN REPLY

If a party convention has authority to nominate, it's an election as a matter of federal statutory law. Whether the FEC properly regarded this law in dismissing petitioner's complaint is the key question raised by petitioner under 2 U.S.C. 437g. This the FEC concedes: "Thus, the determinative question in this case was whether the 1982 Massachusetts Democratic Pre-Primary Convention had the 'authority to nominate a candidate.'" (Opp. Br. p.8)

The FEC gives two reasons why, in its opinion, the jaybird convention did not have authority to nominate. The first is that, as the FEC sees it, the nomination process did not terminate with the jaybird convention's having eliminated Defendant Kennedy's only opponent from the ballot. An undemocratic style ballot with only one choice, in the FEC's view, is not an empty exercise because, though the formalities of such a primary offer no real say to the

voter, petitioner could have run a write-in campaign, had he wanted to.

The second reason the FEC gives to support its contention for lack of authority to nominate is that the word "authority" does not quite mean what it seems to under the test of plain meaning. Instead, in the FEC's view, the word is qualified by a qualification which is now argued in the opposition brief.

This enlarged argument obfuscates the clear concession above. It is the argument that "only if a convention has legal authority" (emphasis added) to nominate is it an "election" under the statutory definition. (Opp. Br. p.8) Thus the FEC argues that there may be authority to nominate that isn't legal, and which, therefore, by that conclusion alone, does not fit within the statutory definition, not because of any language in the statute, but simply because the FEC

has so decided without statutory exegesis. In this the FEC does not admit the real problem posed by a "jaybird" convention, i.e., does a jaybird convention which is given formal state authority outside the normal lawmaking channels have the authority posited by 2 U.S.C. 431 (1)(B) ? Petitioner's question presented no. 3.

This argument violates two important canons of statutory construction developed by this Court in numerous cases.

The FEC held clearly, in dismissing the administrative complaint, that the 15 percent rule convention had authority to do what it did do, which was what the FEC euphemistically called the "winnowing out" of Mr. Hopfmann as the only candidate opposing Mr. Kennedy. (Pet. App. A-11). For the FEC asserted that this "winnowing out" was required by law: "Under Massachusetts law, no candidate for a primary election will be placed upon the

ballot who does not comply with the fifteen percent rule of the party." (Pet. App. A-2, citing "Mass. Gen. Laws Ann., ch. 53, Sec. 44, (West 1975).") If candidates are required by law to comply with the rule, the rule must be law in the FEC's view and the party, in holding the jaybird convention, has authority to apply the rule. The FEC's argument is that the convention, though it "winnows out" by authority, does not, thereby, nominate. The only reason for this conclusion is one extraneous to the clear language of the statute -- the availability of the write-in candidacy possibility.

This argument adds a qualifier to the language of 2 U.S.C. 431 (1)(B), and so falls afoul of petitioner's argument that it is up to the courts to say what the law is, as based on Marbury v Madison, 2 US (1 Cranch) 60, 73 (170) and Allied Chemical & Alkali Workers v PPG Co, 404 US 157, 182.

(Pet. p.49) This Court unanimously said in Bread Political Action Committee v FEC, 455 US 577, that analysis of construction of a provision of the Federal Election Campaign Act (FECA) "must begin with the language of the statute itself." (Emphasis added.) The common meaning of statutory language itself is adhered to unless there is legislative history to the contrary. In support the Court cited two cases: Dawson Chemical Co. v Rohm & Haas Co., 448 US 176, 187; and Consumer Product Safety Commission v GTE Sylvania,Inc.,447 US 102.

Dawson held: "It is axiomatic, of course, that statutory construction must begin with the language of the statute itself." As said in CPSC: "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." 1

Here we have the mere promulgation of a position without "concommitant exegesis of the statutory authority." As such, it lacks "power to persuade." Adamo Wrecking

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[1] Petitioner argues that 2 U.S.C. 431 (1)(B) means exactly what it says. Repeatedly the FEC and the lower courts have ignored the rule of "plain meaning." Our reply below, e.g., said "B: UNAMBIGUOUS STATUTORY LANGUAGE DOES NOT CALL FOR AN INTERPRETATION/ We suggest that 'which has authority to nominate a candidate means precisely what it says. It is not an ambiguous statement. Indeed, it was precisely to remove any possible ambiguity that Congress made the definitional change in 1976....[from 'convention held to nominate' to 'convention with authority to nominate.'] The FEC's discovery of ambiguity in this provision comes late in the day. It is discovered for purposes of defeating the present plaintiff. The position of the FEC is inconsistent with the statute's plain language. This court should not abandon its duty to make the FEC comply with clear legislative intent. This court has ruled, 'It is the function of the courts to require agencies to comply with legislative intent when that intent is clear.' Natural Resources Defense Council, Inc. v Costle, 568 F.2d 1369, 1381 (D.C. Cir. 1977). The FEC would have this court substitute the exception for the rule and defer to the FEC's 'expertise' without even considering the question of whether the statutory meaning is clear."

Co. v U.S., 434 US 275,287. It's not true here that the "Court of Appeals appropriately observed that more than one interpretation of the statutory language has a surface plausibility." Dawson, supra. It's not plausible on the surface of the statutory language that Congress meant to exclude authority which does not come from the legislature, but nonetheless comes from the state through a friendly state court advisory opinion as relied upon by a friendly state official in charge of ballots who is, after all, operating by virtue of the color and authority of his office. It is not plausible, in other words, to assume that Congress intended legal convention elections to be held accountable but not jaybird elections unless there is some clear legislative history indicating that intent, or some consistent judicial precedent leading to that conclusion. The FEC tries to reverse

the burden of demonstrating legislative intent by asserting that petitioner has not shown any legislative history that the statutory language means what it says. (Opp. Br. p.10) It is the FEC's position that petitioner must demonstrate legislative history that varies from the FEC's narrowing interpretation. This is an exercise in attempting to assume a very weak point in argument so as to hopefully forestall its being properly examined.

There is no language here that is "generic and freighted with a meaning derived from the decisional history that preceded it." Adamo, supra. There are no cases prior to this deciding the meaning of this statutory definition.

What the FEC has done here is resort to the extrinsic circumstance of the availiability of the possibility of a write-in candidacy rather than beginning with the language of the statute. That is

forbidden. Caminetti v U.S., 242 US 470.

The word "authority" has a well established meaning in governmental law. As stated in Black's Law Dictionary, it is "the right and power of public officers to require obedience to their orders lawfully issued in the scope of their public duties." Secretary of State Connolly had the power to exclude petitioner from the ballot by virtue of his office whether he was acting extralegally in doing so or not, (His own Attorney General advised him that he was not within his authority, but he chose to obey the advisory opinion of the Supreme Judicial Court.) (Supp. H) What matters is what is "properly understood" as a matter of "common usage." CPSC v GTE Sylvania, supra.

This argument by the FEC has made it clear that the decision below is a direct challenge to this axiomatic and elementary canon of statutory construction as set

out in the precedents of this Court cited above and is yet one more reason why cert should be granted in this instance. If the decision below is allowed to stand, there is great danger that this "plain meaning" canon of statutory interpretation as set out in the cases above will be undermined by agencies substituting their policies for legislative decisions.

The FEC's doing this in this instance is material to petitioner's contention concerning the impropriety of the FEC's having sanctioned with the federal imprimatur the extralegal assertion of alleged First Amendment power by Secretary Connolly in giving authority to the "jaybird" convention. Had the FEC analyzed state law as it actually was, rather than accepting the state court's version of the radical First Amendment claim, it would have had to recognize the convention as authorized but extralegal,

there being nothing before it at the time but a state court advisory opinion. It would then have had to face 2 U.S.C. 431 (1)(B) as meaning what it says and would have had to act upon the administrative complaint. Instead it continues to insist the party rule is state law, inserting this novel but erroneous legal argument in its counterstatement of the case as if it were an assertion of legislative fact when it is a radical assertion of the freedom of association concept. (Opp. Br. p.3).[2]

Even if it were assumed, strictly for purposes of argument, that such activist

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[2] This technique, of course, is SOP in government agency briefing. It might properly be called the Davison Technique, after the late Professor J. Forester Davison, who taught Administrative Law for many years at the George Washington University Law School and co-authored the Davis and Grundstein casebook on administrative law. Professor Davison always gave a lecture in every one of his courses on this technique which he described as the "secret" of writing a winning government agency brief: "Assume your weakest point and then write your

statutory construction and intepretation were in order here, the FEC has still failed to comply with the applicable canon controlling such interpretation. The FEC claims the deference due an interpretive rule. In so doing it ignores that it is not using rules promulgated in accord with the Administrative Procedure Act, but rather using its advisory opinions, which do not comply with rulemaking requirements that federal agencies operating within the law are required to comply with and thus are not legitimate interpretative rules.

Let us make the further assumption, for the sake of the argument, that proper rulemaking requirements were complied with. In that case the deference to be given an interpretive rule depends upon the thoroughness evident in the agency's consideration, the validity of its reasoning, its consistency with earlier

and later pronouncements, and all those factors which give it power to persuade. Skidmore v Swift & Co., 323 US 134,140; SEC v Sloan, 436 US 103, 117-118; Adamo Wrecking, supra, Batterton v Francis, 432 US 416, 425; CPSC, supra. That the FEC was not thorough in its consideration here can be amply seen by examining its opinion (Pet. App. A) in conjunction with the letter it received from the counsel for defendant's Edward M. Kennedy and the Committee to Re-elect Senator Kennedy.[3]

brief as if it were uncontested."

[3] It is not true, as respondent FEC asserts, that the names of these two defendants/respondents were erroneously included in the petition. (Opp. Br. (i) note at bottom) Nor is the FEC assertion that petitioner "acceded" to its motion to dismiss Senator Kennedy and his committee strictly accurate. Neither of these two defendants has ever been dismissed because the petitioner and the FEC were unable to reach agreement on the conditions attached to petitioner's conditional concurrence in the FEC motion to dismiss Senator Kennedy and his committee. To clarify the matter, the filings back and forth on this point are included in the Supplementary Appendix: Supp. B, the FEC's motion to

(Supp.-G) The one simply echoes the other.

dismiss Senator Kennedy and his committee; Supp. C, petitioner's "concurrence" conditioned upon the dismissal being without prejudice to renewal of the complaint against Senator Kennedy and his committee or to the petitioner's constitutional challenges; Supp. E, the FEC's reply to the raising of these conditions by the petitioner which, significantly, was filed after the amended complaint and was entitled by the FEC, "FEDERAL ELECTION COMMISSION'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS (Emphasis added;) (Thus, petitioner's conditional "concurrence" was treated by the FEC as an opposition and responded to as such after the amended complaint was filed; Supp. F. petitioner's rebuttal and clarification to the reply of the FEC. The amended complaint only named the respondent FEC in its style because it was principally devoted to the 2 U.S.C. 437h, (Buckley Provision), constitutional challenges then being newly brought, which were only being brought against the FEC. But it did, in paragraph 7, refer back to, and incorporate by reference the entire petition originally filed under 2 U.S.C. 437g to appeal the FEC dismissal of petitioner's administrative complaint by the FEC, including the style of that petition. So it is clear that the FEC never entertained any illusion that Senator Kennedy and his re-election committee had been dropped from the case in any way until now. It is entirely too late in the day for the FEC to be making any motion in that regard now. The original, unresolved motion, is not before this Court.

The letter's assertions appear to have been accepted without any independent inquiry. Just reading the advisory opinion of the state court attached to the administrative complaint would've revealed that the execution of the party rule as a private law was pursuant to a claimed right under the First Amendment, not to state laws. The invalidity of the FEC's reasoning in its interpretive "rules" can be seen in that its rested exclusively upon the assertion that barred ballot access does not terminate a nomination process because of the unexercised possibility of a write-in effort. The FEC had no earlier pronouncements about jaybird conventions. So consistency with earlier holdings by the FEC cannot be determined by anything on all fours. But its decision to equate such conventions with ones that don't have power to exclude from the ballot, such as in Colorado, on

the one hand,and to equate such conventions, taken together with the ensuing period until the "predetermined" official primary, to uncontested races, on the other hand, argues against the power of FEC reasoning to persuade. The FEC later propounded an advisory opinion consistent with its interpretation in this case, AO 1984-16. This was for a fellow member of Sen. Kennedy's state party organization. This, to crib from the winning briefs in CPSC, was a litigation tactic, not a statutory interpretation. It fails the test of Udall v Tallman, 380 US 1, 18. It clearly wasn't pursuant to policy adopted before the present controversy arose or was thought of. The lack of persuasive power in reasoning is seen in claiming the convention was not an election because it was merely a "winnowing out."

Thus, the newly enlarged argument of the FEC that the convention was not an

election because not legally authorized fails the Skidmore test as well. This canon of statutory construction does apply to the FECA. FEC v Dem. Sen. Camp. Comm., 454 US 27. The inconsistency of the FEC's interpretation in this case with its own rulemaking, as properly exercised, is shown by 11 CFR 100.2 (e), which says nothing about being "legally" authorized.

Again, here is an interpretative canon of this Court's cases that would be challenged by the lower court decisions herein if this petition isn't granted so that the matter may be clarified.

The use that the FEC made of its own advisory opinions in violating these two major canons of statutory construction illustrates why the advisory opinion power presently in the FECA must be more tightly circumscribed. At least in CPSC, supra, the CPSC tried to undermine language in its enabling act with another statute,

albeit one of general application. The FEC here has used its Advisory Opinions, that it can make itself, for this purpose. The Court will recall how, in the FEC's battles with Nat'l Cons. Pol. Action Comm. and the Fund for a Conservative Majority, the FEC has used its advisory opinion power as if it were an Art. III court to challenge a 4-4 affirmance by this Court. The FEC persists in misconstruing petitioner's argument in this regard. The FEC here used its AO powers to mount a challenge to both canons of interpretation discussed above in order to affirm a radical assertion of First Amendment authority by a state tribunal. This is to act as an Art. III court and thereby violate the Case or Controversy provision while illustrating the constitutional weakness of the FECA. The FEC here does not confine its advisory opinion power as an administrative agency must. It hasn't

obeyed APA requirements regulating agency rulemaking nor those governing agency case decisions. It has here sought to alter the language of CFR about conventions.

The FEC raises another new argument in its brief that is so confused it must be replied to. It argues that petitioner has waived his right to protest the participation of the Secretary of the Senate in the FEC. (Opp. Br. p.14) The argument about the Secretary's participation is brought as part of petitioner's challenges pursuant to 2 U.S.C. 437h, which commands the petitioner do exactly as he did. The cases cited by the FEC are inapposite, having nothing to do with such a statutory mandate. The FEC confuses challenges to the constitutionality of specific agency acts with those to the provisions of the FECA as applied, brought pursuant to the direct mandate of 2 U.S.C. 437h.[4]

The FEC now says the standard of review is: arbitrary, capricious, an abuse of discretion or otherwise contrary to law. In its Rule 56 Motion below the FEC argued (support memo, pp. 5-6): "It is well established that in order to find that the Commission acted contrary to law, it must be shown that the Commission acted arbitrarily or capriciously, or abused its discretion." Attempts to point out the rest of the standard to the FEC and the lower courts were responded to with the kind of name-calling demonstrated in the opposition brief. We urge the Court to grant cert in this case so that the FEC begins to heed what it now, for the first time, admits it is bound by.

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4 Nor is the new argument raised by the FEC in its final footnote accurate. On the one occasion that the FEC missed a filing deadline, it, like the petitioner, moved for an extension out of time.

Respectfully submitted,

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November 27, 1985

CERTIIFICATE OF SERVICE

I hereby certify that I have served, by United States Mail, First Class, postage prepaid, this 27th day of November, 1985, true and accurate copies of the foregoing Reply Brief and Appendix, Vol. 2, Supplementary, three copies each upon Charles N. Steele, Esq., General Counsel, U.S. Federal Election Commission, 1325 K Street, N.W., Washington, D.C. 20463; William Oldaker, Esq., counsel for respondents Edward M. Kennedy and the Committee to Re-elect Senator Kennedy (3 copies for each), 1140 19th St., N.W., Wash. D.C. 20036; Hon. Edwin P. Meese, Esq., Att'y Gen. of the U.S., U.S. Dep't of Justice, 1111 Main Justice Building, Wash. D.C. 20530; U.S. Att'y for the District of Columbia, U.S. Courthouse, Washington, D.C. 20001.

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